No. 80-1055

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

WILLIAM T. REMBOLD, JR., Administrator of the Estate of Scott Kendall Rembold, deceased minor, WILLIAM T. REMBOLD, JR., and NANCY CAROL (LIND) REMBOLD,

Appellants,

v.

THE ELIZABETH GAMBLE DEACONESS HOME ASSOCIATION, dba THE CHRIST HOSPITAL, JOHN G. FLEMING, M.D., DR. MUST, JOHN DOE, and JANE DOE,

Appellees.

On Appeal From The Court of Appeals of The First Appellate District of Ohio

MOTION TO DISMISS OR, IN THE ALTERNATIVE, AFFIRM

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MOTION TO DISMISS, OR, IN THE ALTERNATIVE, AFFIRM

It is respectfully submitted that this Court should dismiss the within appeal, or, in the alternative, affirm the judgment of the Court of Appeals of the First Appellate District of Ohio, for the following reasons:

(1) This appeal involves questions adequately reviewed by Courts of Appeal within the State of Ohio, and are therefore not within this Court's jurisdiction;

(2) The failure to raise certain federal questions below abrogates this Court's reviewing them as federal questions.

I. THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE.

A. THE STATUTE

This appeal is an effort on the part of the appellants to raise inappropriate federal constitutional issues concerning the application and validity of Ohio Revised Code § 2305.11, as amended effective July 28, 1975. That statute states, in pertinent part:

> "(B) In no event shall any medical claim against a physician or hospital be brought more than four years after the act or omission constituting the alleged malpractice occurred. The limitation in this Section for filing such a malpractice action against a physician or hospital applies to all persons regardless of legal disability and notwithstanding § 2305.16 of the Revised Code, provided that a minor who has not attained his tenth birthday shall have until his fourteenth birthday in which to file an action for malpractice."

Ohio Revised Code § 2305.16 deals with the statutory legal disabilities of infancy, mental incompetency, and imprisonment.

B. THE PROCEEDINGS BELOW

Appellants have attempted to insert in their discussion of the proceedings below certain extraneous matters which are outside the Record on Appeal in an obvious effort to prey on the sympathy of this Court as opposed to dealing with the legal issues actually involved.

Scott Kendall Rembold was born on July 31, 1962. It is contended that, due to the negligence of the appellees on that date, Scott Rembold suffered certain injuries.

On July 29, 1977, appellants notified appellee, pursuant to statute, that they were considering the filing of a malpractice action, based upon the above allegations of negligence. On October 25, 1978, such an action was initiated.

Appellees, as well as the co-appellee, moved for dismissal, asserting the bar of the Statute of Limitations. On December 8, 1978, the trial court granted that motion and entered judgment in favor of the appellee.

During this time, Scott Rembold died and an appropriate substitution of parties was made.

The Court of Appeals of the First Appellate District affirmed the judgment of the Court of Common Pleas of Hamilton County, Ohio on March 23, 1980. On June 27, 1980 the Supreme Court of Ohio denied the Motion to Certify the Record requested by appellants, and dismissed their appeal. Two Motions for Rehearing were denied on July 30, 1980 and November 26, 1980 respectively.

II. ARGUMENT

A. This Appeal involves questions adequately reviewed by Courts of Appeal within the State of Ohio, and are therefore not within this Court's jurisdiction.

As shown in Appendix B-11 to Appellants' Jurisdictional Statement, the appellants presented to the State Court of Appeals five issues for review. Only two of those issues dealt with challenges to Ohio Revised Code § 2305.11 under the United States Constitution.

Other than those two, the decision rendered by the Court of Appeals and for which the Supreme Court of Ohio denied certification discussed and disposed of the other issues solely on the basis of the Ohio Constitution and statutory provisions. Accordingly, of the "Questions Presented," Questions Nos. 1-A, 1-B, 1-E and 1-F were not raised in the court below, and this Court is without jurisdiction to review such issues.

B. The failure to raise certain federal questions below aborgates this Court's reviewing them as federal questions.

Of the two issues raised in the State Court, appellants essentially raised arguments of (1) vagueness, and (2) equal protection.

With respect to appellants' contention that Ohio Revised Code § 2305.11 is void for vagueness, this cannot be justified. Although the application of a statute to a given litigation may be difficult, the mere fact of that difficulty does not render the statute vague.

Moreover, the Supreme Court of Ohio has clearly and unambiguously interpreted and applied Ohio Revised

Code § 2305.11 in the case of *Vance* v. *St. Vincent Hospital & Medical Center*, 60 Ohio St. 2d 36 (1980). The Syllabus of that Opinion, which, under Ohio Law, is the law of the case, states:

> "A minor of ten years of age or older must file a medical malpractice action within the time limitation set forth in RC 2305.11 (A) and (B), notwithstanding RC 2305.16."

As this Court is well aware, it must accept the interpretation and application made by the Supreme Court of Ohio and test the constitutional validity of the statute based on that interpretation. *Hortonville Joint School District No. 7* v. *Hortonville Education Association*, 426 U.S. 482 (1976). It is respectfully submitted that there is neither ambiguity nor vagueness of Ohio Revised Code § 2305.11, in light of the judicial construction of it in the *Vance* case.

Appellants also propose an equal protection argument.

It is beyond cavil that, absent a fundamental right or a suspect class, the test to be applied with respect to an equal protection argument is the "rational basis" test. In the case of *Denicola* v. *Providence Hospital*, 57 Ohio St. 2d 115 (1979), the Supreme Court of Ohio applied the "rational basis" test concerning a companion amendment to the Ohio Revised Code, which was part of the Omnibus Malpractice Act effective July 28, 1975. The purpose for that Omnibus legislation and rational basis, which the legislature of the State of Ohio found to be appropriate, is contained in Section 8 of that Act, which states:

> "Section 8. This Act is hereby declared to be an emergency measure, necessary for the immediate preservation of the public peace, health, and safety. The reason for such necessity lies in the fact that immediate

> action is necessary to insure a continuance of health care delivery to the citizens of Ohio. Therefore this Act shall go into immediate effect."

The barring of stale claims is the public policy reason for any statute of limitations. As this Court is aware, various statutes of limitation for professional negligence are applied in various jurisdictions. Moreover, in Ohio, there is a one-year Statute of Limitations pursuant to Ohio Revised Code § 2305.11, dealing with the professional negligence of some professions, but a two-year Statute of Limitations concerning professional negligence of other professionals. The mere fact of an unequal treatment does not compel *ipso facto* constitutional infirmities.

Moreover, the selection of the fourteenth birthday of a given individual is analogously justified in the case law and statutes of the state of Ohio. In a personal injury action, upon attaining the age of fourteen years, a plaintiff can be held contributorily negligent. Prior to that time there is a rebuttable presumption that a person cannot be contributorily negligent. Guardianship of minors, pursuant to Ohio Revised Code § 2111.46 is available for change when the ward reaches the age of fourteen. Pursuant to Ohio Revised Code § 2111.12, a minor over the age of fourteen may select a guardian who, if found suitable by the Court, shall be appointed.

Statutes of Limitation are matters of legislative codification of public policy. *United States* v. *Kubrick,* 44 U.S. 111 (1979).

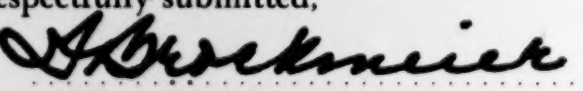
For these reasons, it is respectfully submitted that the legislature of the State of Ohio has a rational basis for the passage and amendment of Ohio Revised Code § 2305.11, and that there is no violation of the equal protection

clause of the 14th Amendment of the United States Constitution.

III. CONCLUSION

As this Court is aware, there were several state legislatures enacting remedial legislation in 1974 and 1975 concerning medical malpractice legislation. There is no substantial federal question of jurisdiction in the within appeal which would require this Court to review the state court action in this case. Accordingly, appellee moves this court to dismiss this appeal, or, in the alternative, to affirm the judgment rendered by the Court of Appeals of the First Appellate District of Ohio.

Respectfully submitted,



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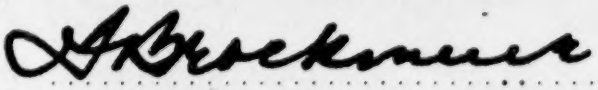
CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of this Motion to Dismiss, or (In the Alternative, to Affirm were served upon each of the following: Marlene Penny Manes, Esq., Eagle Savings Building, Cincinnati, Ohio 45202 and C. J. DeMichelis, Esq., 1200 Gwynne Building, Cincinnati, Ohio 45202, attorneys of record for Appellants and Appellee, The Christ Hospital, respectively, and William J. Brown, Attorney General, State of Ohio, State Office Tower, 30 East Broad Street, Columbus, Ohio 43215, by placing the same in ordinary U. S. mail, postage prepaid, this 29th day of January, 1981.



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